Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
VONAGE HOLDINGS	)	
CORPORATION	)	
	)	**WC Docket No. 03-211**
Petition for Declaratory Ruling	)	
Concerning an Order of the Minnesota	)	
Public Utilities Commission	)	

COMMENTS OF THE NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES

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SUMMARY STATEMENT

The National Association of State Utility Consumer Advocates ("NASUCA") recommends that the Federal Communications Commission ("Commission") postpone any decision on the petition filed by Vonage Holdings Corporation ("Vonage") which asks the Commission to preempt a state commission decision declaring Vonage's Voice over Internet Protocol ("VoIP") service to be a telecommunications service subject to state regulation. The Commission should not, at this time, find VoIP to be an information service rather than a telecommunications service. The Commission, instead, should open a broader docket to fully investigate the numerous regulatory, economic, technical, and public policy issues raised by VoIP service.

I. INTRODUCTION

NASUCA is an association of 44 advocate offices in 42 states and the District of Columbia. NASUCA's members are designated by laws of their respective jurisdictions to

represent the interests of utility consumers before state and Federal regulators and in the courts. NASUCA has consistently championed the rights and benefits that are to accrue to consumers under the Telecommunications Act of 1996.[1] As an organization composed of members from across the Nation, NASUCA can present uniquely the viewpoint of agencies whose charters are to promote and protect the interests of consumers and the public interest.

In the instant Petition, Vonage requests the Commission to preempt -- in the name of the Act -- the Minnesota Public Utilities Commission ("MPUC") order which declared Vonage's VoIP service to be a telecommunications service subject to state laws and the MPUC's rules.[2] As discussed here, the Commission must open a proceeding to address the vital issues raised by Vonage's petition, and other VoIP issues, outside the limiting scope of this request for a declaratory ruling.

On October 16, 2003, the United States District Court of the District of Minnesota issued a permanent injunction that stayed the MPUC order.[3] This stay places Vonage in the same position it had before the MPUC decision; thus Vonage's business is not dependent on the Commission's immediate resolution of this petition.

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[1] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 ("1996 Act"). The 1996 Act amended the Communications Act of 1934. Hereinafter, the Communications Act of 1934, as amended by the 1996 Act, will be referred to as "the Act," and all references to the Act will be to the Act as it is codified in the United States Code.

[2] *In the Matter of the Complaint of the Minnesota Department of Commerce Against Vonage Holding Corp Regarding Lack of Authority to Operate in Minnesota*, MPSC Docket No. P-6214/C-03-108, Order Finding Jurisdiction and Requiring Compliance (September 11, 2003).

[3] *Vonage Holdings Corporation v. Minnesota Pub. Util. Comm.,* Civil File No. 03-5287 (MJD/JDL), Memorandum and Order (October 16, 2003).

In another proceeding, AT&T has petitioned the Commission to declare phone-to-phone VoIP exempted from access charges.[4] Although the Commission has yet to rule on this AT&T petition, there are many issues associated with VoIP in addition to E911, determination of intrastate and interstate traffic, and access charges. There are high cost fund issues, both state and federal. Communications Assistance for Law Enforcement Act ("CALEA") compliance may be an issue for some providers and vendors, but not all. Issues also need to be addressed regarding the evolution to VoIP networks.

Further, the Commission's most definitive statements on VoIP, contained in the *Universal Service Report to Congress*,[5] are five years old and do not reflect the current nature of VoIP service as described in the next section. As a result of all of these factors, the Commission should not rule on the nature of VoIP in the instant proceeding based on the limited record here, but instead, should begin a comprehensive investigation into the impact of VoIP on the industry and consumers.

II. CONSUMERS USE VoIP AS A TELECOMMUNICATIONS SERVICE.

Even if the Commission does not open a separate docket, it should deny Vonage's petition. The key to Vonage's petition is its claim that VoIP service is not a telecommunications

[4] *In the Matter of AT&T's Petition for Declaratory Ruling Concerning Phone-to-Phone IP Telephony*, WC Docket No. 02-361; see also *In the Matter of Petition for Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecommunications nor a Telecommunications Service*, WC Docket No. 03-45.

[5] *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket 96-45, Report to Congress, FCC 98-67, 13 FCC Rcd 11501 (1998) ("*Universal Service Report to Congress*").

service, but an information service. Petition at 1. Yet this claim is refuted by the company's own informational materials. The service a company provides when it uses VoIP technology is described in the following materials from a VoIP "hubsite" and from Vonage's own website.

A. VoIPWATCH.COM[6]

VoIPWatch.com provides the following definition of VoIP on its website:

> **Acronym Defined:**
> VoIP: Voice over Internet Protocal [sic]
>
> **Quick Concept:**
> *How traditional long distance works:*
> You pick up your phone and dial a long distance phone number, the call goes through your local telephone company to your long distance provider who charges you a connection fee and per minute charge, billed monthly in your long distance phone bill.
>
> *How long distance works with VoIP:*
> You pick up your phone and dial a long distance phone number, the call goes through your local telephone company to a VoIP provider, this is a local call. The call then goes over the Internet to the receiver's local calling area were [sic] a local call is placed (by the VoIP provider) to complete the connection. You have just circumvented your long distance company and eliminated your long distance phone bill!
>
> This "quick concept" is based on phone-to-phone VoIP services.[7]

B. VONAGE

Vonage's website advertising clearly demonstrates that it is providing telecommunications services. On Vonage's website, the following material appears:

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[6] VoIPWatch.com is self-described as "the leading industry destination for IP telecommunication providers, enterprises in search of VoIP solutions and home users." http://www.voipwatch.com/about_us.php3?op=viewarticle&artid=13 (accessed October 22, 2003).

[7] See http://www.voipwatch.com/about_us.php3?op=viewarticle&artid=7 (accessed October 22, 2003).

Vonage DigitalVoice is an all-inclusive home phone service that replaces your current phone company.

This is like the home phone service you have today - only better!

Vonage combines domestic US local, long distance, and Canada calls for one flat price because it runs over your high speed Internet connection. Say goodbye to confusing bills and surprising charges. With Vonage DigitalVoice you get unlimited local and long distance calling, Canadian calling, plus great features like Caller ID, Call Waiting and Voicemail. Best of all you only pay one low price.

Use Vonage like you use any telephone

With Vonage, you pick up the phone, hear the dial tone and dial the telephone number of your choice. There are no extra numbers to dial and no special routines to follow. It's that simple. You don't have to be an engineer to use our service. ...

…

Surfing the web

And if you'd like to surf the web and use your Vonage phone service at the same time, it's easy to setup too. You simply plug a networking router (use one you have, or buy one from us during the subscribe process at a 50% discounted rate) into your Cable modem or DSL modem. This allows you to 'share' your high speed Internet connection. Then plug your phone adapter and computer into the router. Talking on the phone and surfing the net with ease at the same time.

How this lets your call travel

Vonage works just like the telephone you have in your home today. You pick up the phone, dial the number and it connects to whom you're calling.

In more technical terms Vonage uses the phone adapter that we send to you for free to convert your voice from an analog signal to a digital signal. The digital signal then can be sent over your high speed Internet connection because it is recognized as data and then is sent over the Internet.

When someone calls you, they dial your number. Behind the scenes, your number looks very much like an e-mail address. This number instructs the call to travel over the Internet and through our network to the phone adapter we sent you free, Your phone rings, and all you have to do is pick up and answer it.[8]

Vonage is clearly a telephone company offering a telecommunications service. The only differences identified by Vonage *in its advertising* between its service and "the home phone service you have today" are 1) price; and 2) the fact that "it runs over your high speed Internet

[8] See http://www.vonage.com/learn howitworks.php (accessed October 22, 2003).

connection."[9]

In the petition, Vonage says that it provides an information service because it "processes" and "transforms" the "information transmitted by its users."[10] Yet the very purpose of VoIP is to reproduce what the caller says on his end as precisely as possible on a real-time basis -- words, tone, accent, and emotion -- to the called party, *just like traditional voice telephone service*. There is no transformation of keystrokes into words on a screen, as with e-mail; there is no visual element, as with searching the web; and there is no storage in digital form, as with MP3 files.[11]

C. MAKING AND RECEIVING VoIP CALLS.

How a VoIP call works -- from the customer's perspective -- is important for determining whether Vonage and similar companies are providing a telecommunications service. This is true for both making and receiving calls.

Making the call (as a Vonage subscriber): The VoIP customer picks up the receiver -- although the customer may also be talking into a computer. The customer dials the number of the party to call -- although the computer may dial the number. When the called party answers, the

[9] Another difference is that with Vonage's service, "You can select any Area Code you want from our list of available area codes. This means even if you live in New York, you can have a California area code." See http://www.vonage.com/area_codes.php (accessed October 23, 2003). The possibilities for calling and called party confusion arising from this capability deserve investigation. See "VoIP service allows Mexican consumers to obtain LA numbers," *TR's State News Wire* (October 23, 2003).

[10] Petition at 12.

[11] Id. at 13.

customer begins speaking. When the call is over, the customer hangs up -- although the computer may also handle the disconnection.

Making the call (to a Vonage subscriber): The caller picks up the receiver. The caller dials the number of the VoIP subscriber. When the VoIP subscriber answers, the caller begins speaking. When the call is over, the caller hangs up.

Receiving the call (as a Vonage subscriber): When the telephone or the computer rings, the VoIP subscriber answers the call and begins speaking. When the call is over, the VoIP subscriber disconnects the call.

Receiving the call (from a Vonage subscriber): When the telephone rings, the called party answers and begins speaking. When the call is over, the called party disconnects.

The calls carried by VoIP providers like Vonage are virtually indistinguishable from calls carried by companies like SBC, Sprint or Verizon over the public switched telecommunications network. To paraphrase an old truism, if it walks like a telecommunications service, talks like a telecommunications service, and has feathers like a telecommunications service, it's a telecommunications service.[12]

The Commission should classify the service based on what the consumer uses the service for; in this case, voice communications. It should not matter if the voice communication is provisioned using cable, wireless, circuit switch or other types of infrastructure. The service is

[12] Vonage's response to this analogy when drawn by the MPSC is that the "analysis cannot survive even the most minimal scrutiny; even if an Internet application walks like a duck and quacks like a duck, the very fact that it is offered over the internet gives it scales like a reptile." Petition at 2. Vonage fails to comprehend that giving a duck scales makes it a duck with scales; the resultant beast is *not* a reptile that quacks, has feathers, and does the duckwalk.

voice communication. It was voice communication when it was provisioned using step-by-step, electro-mechanical or digital switches. It was voice communication when it was provisioned by copper, fiber, radio, satellite or other transport modes. It is voice communication when provisioned using ISDN technology. It is voice communication when it is provisioned using packetized transmission through IP. The regulation of voice communication as telecommunications should be technology-neutral.

D. THE COMMISSION'S DISCUSSION OF VoIP IN THE REPORT TO CONGRESS.

In its petition, Vonage relies extensively -- but selectively -- on the *Universal Service Report to Congress* filed by the Commission in April 1998.[13] The error in Vonage's argument is shown by quoting at length from the Report:

> 83. Having concluded that Internet access providers do not offer "telecommunications service" when they furnish Internet access to their customers, we next consider whether certain other Internet-based services might fall within the statutory definition of "telecommunications." We recognize that new Internet-based services are emerging, and that our application of statutory terms must take into account such technological developments. We therefore examine in this section Internet-based services, known as IP telephony, that most closely resemble traditional basic transmission offerings. … The record currently before us suggests that certain "phone-to-phone IP telephony" services lack the characteristics that would render them information services within the meaning of the statute, and instead bear the characteristics of telecommunications services. …
>
> 84. "IP telephony" services enable real-time voice transmission using Internet protocols. … The voice communications can be transmitted along with other data on the "public" Internet, or can be routed through intranets or other private data networks for improved performance. … Companies such as IDT and Qwest … offer users the ability to call from their computer to ordinary telephones

[13] See Petition at 13-16.

connected to the public switched network, or from one telephone to another. To use the latter category of services, a user first picks up an ordinary telephone handset connected to the public switched network, then dials the phone number of a local gateway. Upon receiving a second dialtone, the user dials the phone number of the party he or she wishes to call. The call is routed from the gateway over an IP network, then terminated through another gateway to the ordinary telephone at the receiving end.

…

86. As we have observed above in our general discussion of hybrid services, the classification of a service under the 1996 Act depends on the functional nature of the end-user offering. Applying this test to IP telephony, we consider whether any company offers a service that provides users with pure "telecommunications." We first note that "telecommunications" is defined as a form of "transmission." Companies that only provide software and hardware installed at customer premises do not fall within this category, because they do not transmit information. These providers are analogous to PBX vendors, in that they offer customer premises equipment (CPE) that enables end users to engage in telecommunications by purchasing local exchange and interexchange service from carriers. These CPE providers do not, however, transport any traffic themselves.

87. In the case of "computer-to-computer" IP telephony, individuals use software and hardware at their premises to place calls between two computers connected to the Internet. *The IP telephony software is an application that the subscriber runs, using Internet access provided by its Internet service provider. The Internet service providers over whose networks the information passes may not even be aware that particular customers are using IP telephony software*, because IP packets carrying voice communications are indistinguishable from other types of packets. As a general matter, Title II requirements apply only to the "provi[sion]" or "offering" of telecommunications. *Without regard to whether "telecommunications" is taking place in the transmission of computer-to-computer IP telephony, the Internet service provider does not appear to be "provid[ing]" telecommunications to its subscribers.*

88. "Phone-to-phone" IP telephony services appear to present a different case. In using the term "phone-to-phone" IP telephony, we tentatively intend to refer to services in which the provider meets the following conditions: (1) it holds itself out as providing voice telephony or facsimile transmission service; (2) it does not require the customer to use CPE different from that CPE necessary to place an ordinary touch-tone call (or facsimile transmission) over the public switched

telephone network; (3) it allows the customer to call telephone numbers assigned in accordance with the North American Numbering Plan, and associated international agreements; and (4) it transmits customer information without net change in form or content.

89. Specifically, when an IP telephony service provider deploys a gateway within the network to enable phone-to-phone service, it creates a virtual transmission path between points on the public switched telephone network over a packet-switched IP network. These providers typically purchase dial-up or dedicated circuits from carriers and use those circuits to originate or terminate Internet-based calls. *From a functional standpoint, users of these services obtain only voice transmission, rather than information services such as access to stored files*. The provider does not offer a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information. Thus, the record currently before us suggests that this type of IP telephony lacks the characteristics that would render them information services within the meaning of the statute, and instead bear the characteristics of telecommunications services.

…

91. *In upcoming proceedings with the more focused records*, we undoubtedly will be addressing the regulatory status of various specific forms of IP telephony, including the regulatory requirements to which phone-to-phone providers may be subject if we were to conclude that they are "telecommunications carriers." The Act and the Commission's rules impose various requirements on providers of telecommunications, including contributing to universal service mechanisms, paying interstate access charges, and filing interstate tariffs. We note that, to the extent we conclude that certain forms of phone-to-phone IP telephony service are "telecommunications services," and to the extent the providers of those services obtain the same circuit-switched access as obtained by other interexchange carriers, and therefore impose the same burdens on the local exchange as do other interexchange carriers, we may find it reasonable that they pay similar access charges.[14]

[14] *Universal Service Report to Congress*, ¶¶ 83-90 (emphasis added).

One of the key weaknesses of Vonage's petition is that it characterizes the very tentative determinations in the *Universal Service Report to Congress* as definitive rulings. For example, Vonage states,

> The Commission summarized its analysis by crafting a four-part test for determining when IP telephony services should be characterized as telecommunications services, rather than information services. Telecommunications services, it found, are characterized by the following:[15]

Yet the Commission actually stated that "[i]n using the term 'phone-to-phone telephony, *we tentatively intend to refer* to services in which the provider meets the following conditions:"[16] and then stated that "the record currently before us *suggests* that this type of IP telephony … bears the characteristics of telecommunications services."[17] This hardly represents a "finding" by the Commission. Indeed, nothing in the discussion in the *Universal Service Report to Congress* gives any indication that the FCC would not consider a VoIP provider like Vonage to be providing a telecommunications service today if the Commission had a full record before it. Vonage's petition does not describe any feature about its service that *functionally* distinguishes it from traditional voice service. The Commission should open a proceeding and develop a record focusing on VoIP.

[15] Petition at 16.

[16] *Universal Service Report to Congress*, ¶ 88 (emphasis added).

[17] Id., ¶ 89 (emphasis added).

III. VoIP'S IMPACT ON CONSUMERS' HEALTH AND SAFETY

Vonage has requested the Commission to find that state 911 requirements -- specifically the Minnesota 911 requirements --- conflict with Federal policy. Vonage avers that it does not enjoy the same interconnection rights to the incumbent local exchange provider ("ILEC") for E911 facilities because it is an information service provider.[18] It further argues that Vonage users can change their physical location without notice.

Requiring E911 for VoIP does not conflict with Federal policy. Indeed, both State and Federal policies have found that consumers' health, welfare and safety during emergencies are essential and in the public interest. VoIP providers must provide voice communications to police, fire departments, and medical personal because it is indispensable to consumers.

Vonage could negotiate with the ILECs for an Interconnection Agreement ("ICA") to obtain access to facilities. The ILEC cannot refuse to provide any carrier with interconnection facilities so long as the requesting carrier has signed an ICA. Vonage apparently has not explored this option, because of its pretensions to information service provider status.

[18] It should be noted that Vonage's claimed disability is entirely the result of the Company's decision to maintain the fiction that is it only an information service provider. Other VoIP providers have sought and received certification as local exchange carriers and obtained interconnection agreements. For example, Cbeyond received its Colorado Certificate of Public Convenience and Necessity (Docket 00A-433T, Decision 00-1021; Adopted Date: September 13, 2000; Mailed Date: September 19, 2000). It also obtained an Interconnection Agreement (Docket No. 01-238, Effective August 2, 2001)

Finally, an E911 solution for VoIP traffic is possible even though the consumers change physical locations. The industry found a solution for wireless traffic. It seems very reasonable that the industry participants can also find a solution for VoIP.[19]

At base, Vonage is asking the Commission to allow Vonage's business plan and information service pretensions to override the emergency service determinations of the states. In this respect as in many others, those closest to the public -- in the states -- have a clearer idea of the needs of their citizens than Vonage or this Commission.

IV. VONAGE'S JURISDICTIONAL TRAFFIC ISSUES

Vonage has also requested as part of its request for a declaratory ruling that if the Commission cannot decide that Vonage is providing an information service, nonetheless there should be preemption of state action because Internet traffic cannot be separated between the interstate and intrastate jurisdictions.[20] Yet this is also largely true in the circuit switched environment. When a business customer purchases a DS3 for transport and uses it for both interstate and intrastate traffic, the digital nature of the traffic makes it equally difficult to determine jurisdictions. However, this does not mean that an industry solution (e.g., Operational Support Systems, vendor equipment) could not be developed to identify the jurisdictional nature

[19] See http://www.vonage.com/features_911.php.

[20] Petition at 27-31.

of the traffic, if necessary. And it does not mean that states can have no role in the regulation of such services. Vonage's jurisdictional argument is not a basis for preemption.

V. THE IMPACT OF VoIP ON ACCESS CHARGES

The Commission must take great care in considering whether VoIP is an information service because of the issues raised by the AT&T VoIP phone-to-phone access charge petition. MCI and Comcast, like AT&T, have announced migration of their current networks to VoIP-based architectures.[21] As more carriers migrate to VoIP, exemption from paying access charges will have a dramatic economic impact on ILECs, Competitive Local Exchange Carriers ("CLECs") and consumers alike.

Access charges are designed to compensate carriers for the use of their networks. To the extent that VoIP providers are able to avoid access charges, they are enjoying a free ride based on other carriers' investments.

As the Commission well knows, the access charge regime is a multi-billion dollar market. These access revenues, in part, assist carriers in funding capital expenditures. If the goal of the Act is to promote facilities-based providers, these funds for capital improvement and expansion of the networks will be significantly reduced due to a VoIP exemption.

The continuing erosion of access charge revenues due to the VoIP exemption could result in substantial increases in local rates. The Colorado Public Utilities Commission ("CPUC")

[21] See "Battered Telecoms Face New Challenge: Internet," "Comcast Is to Expand Trials of Web-Based Phone Service Calling," *Wall Street Journal* (October 9, 2003); "MCI Vouches for Nortel's VoIP," *Light Reading* (June 3, 2003).

recently investigated intercarrier compensation issues. In the Report issued by that Commission, it found that rural local exchange companies' rates would have to be increased substantially if both interstate and intrastate access revenues were eliminated. For example, Agate's local rate would have gone from approximately $5 to $88 per month, and South Park's local rate would have gone from approximately $30 to $175 per month.[22] This is counter to the national and state goals of universally affordable local rates.

The Commission is investigating the interstate access regime in another docket.[23] Yet the Commission should work closely with state commissions to identify the economic impacts of a VoIP exemption on carriers and consumers from intrastate and interstate perspectives.

VI. VoIP IMPACT ON HIGH COST FUNDS

The classification of VoIP as an information service that is exempt from access charges will also have an impact on the federal and possibly state high cost universal service funds. There are two possible impacts. First, if as noted above the loss of access charge revenues causes substantial rate increases, the high cost support funds would have to be increased in order to keep the local exchange rates affordable as directed by the Act. Congress and the FCC are currently investigating whether these funds will be sustainable in the future; increases in the fund may jeopardize the public policy need to maintain these funds.

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[22] *In the Matter of the Investigation into the Modification of Commission Practice and Procedures Regarding Intercarrier Compensation*, Docket No. 001-494T, Decision No. C02-150 (adopted and mailed dates: February 20, 2002).

[23] *In the Matter of Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Notice of Proposed Rulemaking, FCC 01-132 (rel. April 27, 2001).

Second, following Vonage's logic, VoIP providers would not be contributors to these funds because its service would be classified as information service.[24] As Vonage and other VoIP providers accumulate more and more customers, the revenues classified as interstate that are currently the source of USF contribution would decline.[25] This would dramatically drive up the surcharges assessed on customers' bills, causing more customer dissatisfaction resulting in further pressure on public policy makers to alter or eliminate the funds. The Commission should refer the high cost funding issues from VoIP to the Federal-State Joint Board on Universal Service.

VII. CALEA COMPLIANCE ISSUES

It is unclear whether VoIP providers and their networks are compliant or should comply with the Communications Assistance for Law Enforcement Act of 1994 ("CALEA").[26] In 1994, CALEA expanded law enforcement authority to set standards to carry out electronic surveillance

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[24] Vonage assesses its customers a "Regulatory Recovery Fee" that is claimed to be a contribution to the universal service fund.

> The Regulatory Recovery Fee is $1.50 per phone number. This is a fee that Vonage charges its customers to recover required costs of Federal and State Universal Service Funds as well as other related fees and surcharges. Your total Regulatory Recovery Fee reflects a $1.50 surcharge for every phone number you have including primary voice lines, second lines, fax lines, Toll Free Plus℠ numbers and Virtual Phone Numbers℠.

See http://www.vonage.com/help/?topic=rrf. Apparently, Vonage is covering the universal service assessments placed on it by local carriers as it purchases service as an end user. Petition at 7. Whether this is an appropriate amount is for the Commission to determine.

[25] Consistent with NASUCA's comments in CC Docket 96-45, it should be clear that the solution to this problem is **not** the adoption of a connections-based or a numbers-based contribution mechanism, as advocated by some carriers. The correct solution is to include VoIP revenues in the interstate base assessed under the current revenue-based mechanism.

[26] Pub. L. No. 103-414, 108 Stat. 4279.

when appropriate authority is granted. Carriers must be CALEA-compliant in order to assist law enforcement with their duties. The goals of the CALEA are to protect public safety and ensure national security. These goals are especially important today because of national security risks. The Commission should investigate whether VoIP meets the CALEA standards.

VIII. CONCLUSION

For the reasons set forth herein, NASUCA submits that the Commission should not enter a Declaratory Order as requested by Vonage's petition. It should, on the other hand, undertake a comprehensive examination of the interrelated issues to ensure consumers are protected and receive the benefits of the new technology.

Respectfully submitted,

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